IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

A. CHERNEY DISPOSAL CO. and O. Z. MILLER, LTD.,
Plaintiffs,

vs.

CHICAGO & SUBURBAN REFUSE DISPOSAL CORPORATION, et al.,
Defendants.

No. 70 C 1052

JUDGMENT ORDER AND MEMORANDUM OPINION.

This is a private antitrust action. The case is brought pursuant to the provisions of Sections 4 and 16 of the Clayton Act, 15 U. S. C. § § 15 and 26, and 28 U. S. C. § 1337. The complaint charges violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. 1 and 2. Before the court is defendants' motion for summary judgment on all claims under Rule 56 of the Federal Rules of Civil Procedure or in the alternative for summary judgment on plaintiffs' claims with respect to the private scavenger business.

Plaintiffs are two small Illinois corporations engaged in the private scavenger business in the metropolitan Chicago area. Defendants consist of a large trade association of private scavengers, private scavenger company members of the Association, refuse incineration companies, individual owners and officers of the member scavenger companies and two scavenger equipment manufacturers.

The complaint alleges violations of Sections 1 and 2 of the Sherman Act. It alleges that the defendants have combined and conspired to restrain and monopolize the private scavenger

business within the geographic area including Chicago, its suburbs, parts of Indiana, and Wisconsin contiguous to the Chicago metropolitan area and St. Joseph, Missouri. It is alleged that defendants have created unreasonable restraints on competitive opportunity and commercial freedom in the private scavenger business in the Chicago area by acts including price fixing, concerted refusals to deal, reciprocal dealing, collusive bidding, market allocation, boycotts, attempts to drive non-member scavengers out of business, and attempts to monopolize the private scavenger business for member scavengers only, beginning prior to 1960 and continuing to the present date. These acts are allegedly primarily accomplished through the rules and practices of the trade association and secondarily by pressuring non-Illinois scavenger equipment manufacturers to refuse to deal with plaintiffs. In addition, however, plaintiffs allege that defendants cause labor unrest among plaintiffs' employees, intimidate plaintiffs with physical harm and misrepresent facts to plaintiffs' customers.

The court is presented here with defendants' motion for summary judgment on all claims or in the alternative for summary judgment on plaintiffs' claims with respect to the private scavenger business. All defendants have joined in this motion. Defendants move for summary judgment on the grounds that this court lacks jurisdiction over the subject matter of the complaint. In the alternative defendants seek summary judgment with respect to all plaintiffs' claims which relate to the alleged conspiracy to restrain trade in and monopolize the private scavenger business in the market area, thereby reserving for trial only plaintiffs' claim that a non-Illinois equipment manufacturer, Leach Company, refused to deal or to deal on non-discriminatory terms with plaintiffs. Both sides have submitted affidavits and briefs in support of their positions.

The federal courts are courts of limited jurisdiction. The threshold question for a court's determination is whether it has jurisdiction over the cause. While in the antitrust field

the result may not be different by considering an attack on the court's jurisdiction as a motion to dismiss for failure to state a claim, or as a motion for summary judgment, it is still in substance an attack on the court's jurisdiction. A challenge to the court's jurisdiction is most properly raised by a motion to dismiss.

Defendants' effort to transform what is essentially a motion to dismiss for lack of jurisdiction into a motion for summary judgment can be of no advantage to them. The only proper court order, if the motion is successful, is dismissal since the court would have no jurisdiction to make determinations on the merits of the claims presented. Perhaps the submission of affidavits, materials outside of the pleadings, led defendants' counsel to the conclusion that the motion should be properly labeled as a motion for summary judgment.

If this motion were properly a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and matters outside the pleadings were presented to the Court, then the motion must be treated as a motion for summary judgment as provided in Rule 56. This would be proper because the court would have previously determined that it had jurisdiction, and the thrust of the motion to dismiss, supported by matters outside the pleadings, would go to the merits of the issues presented in the complaint. However, it is premature to look to the merits when it is jurisdiction which is being challenged.

Further, there is no bar to the consideration by the court of matters beyond the pleadings when they are presented with a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). 2A *Moore's Federal Practice* § 1209; *Pintozzi* v. *Scott,* 436 F. 2d 375 at 378 n. 3 (7th Cir. 1970). Therefore, the court takes defendants' motion for summary judgment as a motion to dismiss for lack of jurisdiction. The court now turns to the issue of jurisdiction.

Plaintiffs allege violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. § § 1, 2. Both Sections 1 and 2 limit the

scope of the Sherman Act by the phrase ". . . trade or commerce among the several States, or with foreign nations, . . .". Since its enactment the Supreme Court has concluded that by enacting of the Sherman Act, Congress exercised its full power over interstate commerce. *U. S.* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 298, (1945); *U. S.* v. *Southeastern Underwriters Association*, 322 U. S. 533, 558 (1944). Therefore, the Sherman Act extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially affect interstate commerce. *U. S.* v. *Chrysler Corp.*, 180 F. 2d 557 (9th Cir. 1950); *Mandeville Island Farms Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 235 (1948).

As set forth clearly in *Las Vegas Merchant Plumbers Ass'n.* v. *United States*, 210 F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U. S. 817 (1954), the courts have applied two tests in determining whether particular conduct is ". . . trade or commerce among the several States . . ." subject to the Sherman Act. In the first, known as the "in commerce" or "qualitative" test, the Sherman Act is activated if the activity occurs within the flow of interstate commerce, even though the activity is local and has only an insubstantial effect on the flow of commerce. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U. S. 656 (1961); *U. S.* v. *Central States Theatre Corp.*, 187 F. Supp. 114 (D. Neb. 1960). In the second, known as the "affecting commerce" or "quantitative" test, activity comes within the Sherman Act if it occurs wholly on the state or local level, in intrastate commerce, but significantly or substantially affects interstate commerce. This purely local activity may violate the Sherman Act if it substantially affects an interstate commerce market either directly or through its interplay with other business activities. *Burke* v. *Ford*, 389 U. S. 320 (1967); *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964); *Marriott Hotels* v. *Heart of Atlanta Motel, Inc.*, 232 F. Supp. 270 (N. D. Ga. 1964); *Hardrives Co., Inc.* v. *East Coast Asphalt Corp.*, 329 F. 2d 868

(5th Cir. 1964). Under either test, the transactions complained of must affect or have an effect on interstate commerce, or the Sherman Act will be inapplicable. It is only those acts which are "purely local" under both tests, not within the flow of interstate commerce and without significant effect on that flow, which are beyond the reach of the Sherman Act.

Upon the facts before this court, the pleadings, affidavits and briefs, this court finds that it has no jurisdiction under the Sherman Act to hear this case. There has been no showing in the complaint and affidavits filed in response to defendants' motion that this court has jurisdiction pursuant to the Sherman Act.

Essentially, plaintiffs allege three grounds for jurisdiction under the antitrust laws:

(1) *One of defendants' principal methods of eliminating plaintiffs as competitors was to directly interfere with interstate commerce in scavenger packer equipment.*

The jurisdictional requirements pursuant to the Sherman Act are not satisfied by allegations involving effects on interstate commerce which are merely incidental to the plaintiffs' local business. *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341, 343 (9th Cir. 1969); *Lieberthal* v. *North Country Lane, Inc.*, 332 F. 2d 269, 271 (2nd Cir. 1964); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 162 F. Supp. 300, *rev'd on other grounds*, 274 F. 2d 934 (9th Cir. 1960); *Page* v. *Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U. S. 875 (1961).

Plaintiffs allege restraint of the interstate commerce in scavenger equipment. There is nothing to indicate the amount of commerce affected beyond two truck bodies, or that the alleged restraint affects any scavenger equipment other than the equipment that would have been supplied to plaintiffs, which employ four persons and operate four refuse collection trucks. This, by

the most generous interpretation, is a far cry from a substantial effect on interstate commerce. *Lieberthal, supra.*

It could also be said that defendants' scavenger equipment companies are interstate businesses. But the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business. *Page* v. *Work, supra.*

Further, plaintiffs allege no injury resulting from the alleged refusal to deal in scavenger packer equipment. Some indication of injury is a prerequisite under 15 U. S. C. §§ 15 and 26.

The allegation of refusal to deal here appears as incidental to the gravamen of the complaint as its interstate commerce effect appears incidental to plaintiffs' local business. These allegations, taken in light of the affidavit filed in its support, furnish no basis for finding jurisdiction pursuant to the Sherman Act, transforming essentially local and incidental activity into interstate activity.

(2) *One of the methods of monopolization was to threaten total boycotts of large retail grocery chains which operate in interstate commerce in order to prevent such companies from employing plaintiffs for scavenger services in any individual store of the chain.*

Plaintiffs argue that the acts complained of affected a business engaged in interstate commerce, in that threatened boycotts of defendants' client, supermarket chains, if any store of the chain accepted the services of plaintiffs' scavenger service, had a substantial effect on the business of the clients by raising their operating costs which thereby affected their interstate business. However, the 9th Circuit cases of *Page* v. *Work, supra* and *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969) are persuasive in their reasoning that the test is not whether the acts complained of affected a business which happened to be engaged in interstate commerce, but whether the acts affected the interstate commerce part of the

business. On the facts of this case, interstate commerce was doubly insulated from effect by the acts alleged. Not only did the defendants' intrastate acts not affect interstate commerce in the business, but there is no effect, except the most metaphysical, upon the interstate business of the third party grocery chains.

(3) *The defendants' scavenger business includes substantial transportation and sales across state lines.*

Plaintiff alleges that on certain occasions members of defendant trade association crossed Illinois state lines into Wisconsin or Indiana, to service scavenger accounts. While there is some conflict between the affidavits, if the alleged interstate crossings are taken as true, they are too small and too trivial, when seen within the context of the scope of the business, to create jurisdiction in a federal court.

As concerns the claim that the market area includes areas outside of Illinois, this claim alone is not sufficient to invoke the jurisdiction of the federal court. Taking into consideration the affidavits and depositions filed in this matter, the claim of the interstate geographical limits of the market area are not sufficient.

The failure of jurisdiction in federal court does not imply that plaintiffs are without a remedy. The State of Illinois has a comprehensive Antitrust Act under which plaintiffs may bring their cause in the Illinois Circuit Court. 38 Ill. Rev. Stat. 60-1 et seq.

Defendants' motion for summary judgment is taken as a motion to dismiss for lack of jurisdiction. The motion is granted. Case dismissed.

/s/ R. B. Austin
Judge, United States District Court

Dated: February 15, 1972.